

DISTRICTED

SEP 1 78

Supreme Court, U. S.
FILED

SEP 1 1978

MICHAEL BABAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 77-1771

BARBARA LUSTGARTEN, M.D.,
Petitioner,
vs.
FRANK C. BAKER, et al.,
Respondents.

**REPLY TO BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

ROBERT E. MANLEY
4500 Carew Tower
Cincinnati, Ohio 45202
Telephone: (513) 721-5525
Attorney for Petitioner

JOSEPH R. JORDAN
TIMOTHY A. FISCHER
4500 Carew Tower
Cincinnati, Ohio 45202

DAVID A. KOHNEN
JAMES A. HUNT
KOHNEN & KOHNEN
4500 Carew Tower
Cincinnati, Ohio 45202

CONRAD A. CURREN
330 Jefferson Street
Greenfield, Ohio 45123

IN THE
SUPREME COURT OF THE UNITED STATES

No. 77-1771

BARBARA LUSTGARTEN, M.D.,
Petitioner,

vs.

FRANK C. BAKER, et al.,
Respondents.

**REPLY TO BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

In their brief in opposition, Respondents have argued new issues which form no basis for the judgment of which Petitioner seeks review. Respondents' arguments, however, obscure the importance of Petitioner's cause, thus justifying this reply.

REVOCATION VERSUS "NON-RENEWAL"

One new issue argued by the Respondents is one of semantics. The action taken by the hospital Board against Petitioner, a physician on the hospital staff, deprived Petitioner of her hospital staff privileges. At every level of the state proceedings below, it was acknowledged that Petitioner was a member of the staff of a public hospital and entitled to due process of law before her hospital staff privileges could be terminated; this distinguished Peti-

tioner from physicians who were seeking admission to a hospital staff for the first time.¹ Respondents now raise an argument neither raised in the state court below nor having any basis in Ohio law: that Petitioner was the victim of "non-renewal" of her privileges rather than "revocation." This is a distinction without difference. It is of semantic note only. The court below was correct in at least distinguishing Petitioner's status from that of a new applicant.

WAIVER

Another issue raised by Respondents is some sort of waiver theory. The essence of Respondents' argument is that by seeking a preliminary court order granting her a

¹ "A Doctor has no constitutional right to practice medicine in a public hospital. *Hayman v. Galveston*, 273 U.S. 414, 47 S.Ct. 363 (1927). Once having been admitted to the staff of a hospital a physician has a protected right in maintaining that status and such status may not be revoked arbitrarily or capriciously. *Foster v. Mobile County Hospital*, 398 F.2d 227 (5th Cir. 1968); *Sams v. Ohio Valley General Hospital*, 413 F.2d 826 (4th Cir. 1969).

"The physician is entitled to due process of law. *Klinge v. Lutheran Charities Assoc. of St. Louis*, 523 F.2d 56 (8th Cir. 1975). Due process means that a physician is entitled to reasonable notice of the charges against him and a reasonable opportunity to defend against those charges. *Christhilf v. Annapolis Emergency Hosp. Association*, 496 F.2d 174 (4th Cir. 1974). The doctor has the right to present witnesses and other evidence to rebut those charges and the administrative panel, in deciding those issues, must be free of bias or prejudice. *Gibson v. Berryhill*, 411 U.S. 564, 93 S.Ct. 1689, 36 L.ed. 2d 488 (1973); *Wall v. American Optometric Association*, 379 F.2d 175 (Ga. 1974) *affd.* 418 U.S. 858. Due process, however, does not require a full blown judicial trial." (Court of Appeals Opinion, Appendix to Petition, pp. 6a-7a.)

The right of a physician to remain on a hospital staff is a vested property right under Ohio law. *Davidson v. Youngstown Hosp. Assoc.*, 19 Ohio App.2d 246 (1969).

due process hearing, Petitioner waived all of the elements of due process, since no particular requirements were specified in the order.² Respondents thus suggest that instead of obtaining a due process hearing, Petitioner only waived the very due process that she sought. But if there were any doubt that anyone, including the Respondents and the Court of Common Pleas which issued the order requiring a due process hearing, considered Petitioner's objections to have been raised in a timely manner, the proceedings of the Board and the courts below dispel it.

First, at the commencement of the Board hearing, the Board considered the participation of Dr. Ayres and hospital administrator Baker in the Board hearing. It did so making express reference to the court's mandate for a due process hearing, and it ordered hospital administrator Baker excluded from the hearing except as a witness, and Dr. Ayres excluded as a witness only.³

² Initially, Petitioner had to seek a court order to prevent termination of her privileges before a hearing could be held by the hospital Board. The proceedings are explained in footnote 2 of the Petition. The order of the court is the sole appendage to Respondents' brief in opposition.

³

"MR. GRIFFITH [Board President]: Okay, thank you George. I think at this time Mr. Baker has a statement he'd like to make to the Board.

"MR. BAKER, ADMINISTRATOR: I have the delima of being the Administrator and Chief Executive Officer of this Hospital. In so doing, I am the advisor of this Board. On the otherhand, I also am placed in a position of being a material witness in this matter, and so there arises the question as to whether I should be present during these hearings, and we have discussed this matter between the Chairman of the Board and myself and the Hospital Attorney, and it is my desire that this matter be put to the Board and whatever your desires are, I will bow to those.

"MR. GRIFFITH: I would at this time like to take the Board into executive session with Mr. Curran present and Mr. Bob McMullen present. —

"REPORTER: Do you want this taken down?

Further, on the objection raised by Petitioner, the Court of Common Pleas which entered the initial order requiring the due process hearing undertook to review the Board decision under the appellate jurisdiction which that court had retained. The judgment of that court shows that

"MR. GRIFFITH: No. MR. McMULLEN: No.

"THEREUPON: The Board went into executive session with no record being made of that session, which lasted approximately one hour.

"THEREUPON: The executive session ended and the following was placed on record

"MR. GRIFFITH: I think we're ready to go into session now if

"DR. AYRES: Am I formally excluded as a witness, is that what you're saying?

"MR. GRIFFITH: I think at this time in order to offer due process, yes, Dave.

"DR. AYRES: My understanding is I will have the right to cross-examine witnesses without undue complaint from —

"MR. McMULLEN, ATTORNEY FOR THE BOARD: I believe any Member of this Board has a right to ask any witness a question during course of the testimony — Everybody has this right here, except for me, and the Reporter.

"MR. GRIFFITH: I think at this time then we probably need Dr. Lustgarten back in the room.

(NOTE: Dr. Lustgarten went out of the room while the Board was in Executive Session.)

"BOARD MEMBER WOLFER: Has Mr. Baker been informed of the decision of the Board?

"BOARD PRESIDENT GRIFFITH: Not yet. We have reached two decisions, one concerning Frank Baker, and at this time I will let Mr. McMullen explain that to the —

"ATTORNEY McMULLEN: It is my understanding of the situation as it presently exists that Mr. Baker, in his capacity as Hospital Administrator, who has indicated that he will be one of the witnesses, will be excluded from this hearing during the course of the hearing, except such time as he may be here for the purpose of giving testimony and except on such other occasions as he may be recalled into the hearing room by this Board for the purpose of additional questions or for the purpose of giving any advice that the Board may ask of him.

"PRESIDENT GRIFFITH: Okay. And the second one concerns Dr. David Ayres as membership of the Board.

"MR. McMULLEN: Now, it's my understanding as regards to

waiver was no basis of the court's affirmance of the Board.⁴ Similarly, the Court of Appeals, in the decision here sought to be reviewed, found no defect in the timeliness of Petitioner's objection to Dr. Ayres' participation in the hearing, nor did it find that any waiver of Petitioner barred its consideration of the issue.

THE MERITS

Respondents further contend that "[t]he true issue of the case is whether a Board of Governors may protect other members of a hospital staff from the abusive and unprofessional conduct of a fellow staff member." (Brief in Opposition, p. 13.) This issue, of course, begs the real questions presented by Petitioner to this Court: whether or not the Board's decision was arrived at constitutionally.

Neither the Board nor the Court of Common Pleas on appeal made any findings of fact. To the Court of Appeals, Respondents provided in their brief an elaborately embellished statement of evidence which they reproduced as a footnote on pp. 6-8 of their brief in opposition. Upon review of the transcript, however, the Court of Appeals,

Dr. Ayres, he will not be testifying as a witness, but will sit as a Board Member and participate in the full function of this hearing as a Board Member.

"MR. CURREN: For the record, we move the Board to exclude Dr. Ayres from participating in this hearing, since we feel that in the interest of due process, he cannot fairly sit both as an accuser and as a Member of the Board. If he is not permitted to testify as a witness, we feel probably if it were a reverse, he could testify as a witness and not sit as a member of the Board. We do object to this, and we feel that he should voluntarily step down as a member of this Board concerning this one particular question. Nothing else.

"THE COURT [(sic) PRESIDENT GRIFFITH]: It will be the decision of this chair that Dr. Ayres remain as a member of this Board throughout this hearing.

"MR. CURREN: Note our exceptions." [Transcript pp. 3-5.]

⁴ Appendix to Petition, pp. 1a-2a.

in its decision, does not successfully find or point out any specific incident supported by persuasive evidence. The Court cited, for example, the charge that Petitioner allegedly refused emergency room duty; it stated: "[w]e note that Dr. Lustgarten presented evidence to justify her refusal but it was for the Board to determine the sufficiency of that justification." (Appendix to Petition, p. 16a.) The Court also noted, for example, "[t]here was the matter of Dr. Lustgarten's residency in the maternity ward when her house burned down which jeopardized the hospital's certification. It should be noted that here again Dr. Lustgarten presented evidence to justify her behavior." (Appendix to Petition, p. 16a.) Indeed, the importance of due process in the Board hearing is demonstrated by the only holding of the Court of Appeals on the merits of the charges:

"[P]etty personality conflicts are not to be magnified out of proportion but whether a problem is a personality clash or serious administrative difficulty, is to be decided by the Board and if the Board finds it necessary to act, the courts will not set aside that decision if the record discloses it is supported by reliable evidence." (Appendix to Petition, p. 16a.)

Accordingly, where a Court of Common Pleas below sitting as a reviewing court refused to make its own findings of fact,⁵ and where the Court of Appeals below affirmed, holding that the findings of the Board must be accepted, the real question is clearly whether or not the Board which made those findings was free of bias and prejudice and otherwise afforded Petitioner due process of law. These are the questions presented to this Court by Petitioner for review. The questions newly raised by Respondents are but a diversion.

⁵ Appendix to Petition, p. 3a.

CONCLUSION

The petition for writ of certiorari should be granted on the questions presented therein.

Respectfully submitted,

ROBERT E. MANLEY

4500 Carew Tower
Cincinnati, Ohio 45202
Telephone: (513) 721-5525

Attorney for Petitioner

JOSEPH R. JORDAN
TIMOTHY A. FISCHER
4500 Carew Tower
Cincinnati, Ohio 45202

DAVID A. KOHNEN
JAMES A. HUNT
KOHEN & KOHNEN
4500 Carew Tower
Cincinnati, Ohio 45202

CONRAD A. CURREN
330 Jefferson Street
Greenfield, Ohio 45123